90-1298

No.

FILED
FEB 7 1991
OFFICE OF THE CLERK

IN THE

# Supreme Court of the United States

October Term, 1990

AMER AL-ZUBAIDI,

*Petitioner,*

v.

M. A. IJAZ, *et al.*,

*Respondents.*

## PETITION FOR WRIT OF CERTIORARI FROM THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Linden Tower Building
Suite 108
2nd & Franklin Streets
Richmond, Virginia 23219
(804) 788-4412

* Gerald T. Zerkin
Kelley H. Brandt
Robert Godfrey

* *Counsel of Record*

Appellate Printing Services • 523 East Main Street • Richmond, VA 23219 • (800) 642-7789

## QUESTION PRESENTED

Does a committee recommendation for termination shield a defendant advisor or supervisor from liability in a mixed motives case under §1983 when the defendant's actions, which were motivated by an impermissible animus, were a substantial factor in causing that recommendation?

## LIST OF PARTIES

The parties to the proceedings below were the petitioner, before this Court, Amer Al-Zubaidi, the respondent, M. A. Ijaz, and Virginia Polytechnic Institute and State University, Kazuo Gotow, Richard A. Arndt, S. P. Almeida, John R. Ficenec, C. D. Williams, L. David Roper, T. K. Lee, William Lavery, and Thomas E. Gilmer, Jr.

Although the district court granted summary judgment to all defendants except Ijaz, petitioner maintains that the other parties are necessary to fashion an appropriate remedy. The court of appeals did not reach this issue as it ruled against petitioner on the merits. (App. A-3, 4).

## TABLE OF CONTENTS


Page

QUESTION PRESENTED.....i

LIST OF PARTIES.....ii

APPLICABLE PROVISIONS OF LAW.....vii

OPINIONS BELOW.....2

JURISDICTION.....2

STATEMENT OF THE CASE.....2

A. The Proceedings Below.....2

B. The Facts In This Case...5

REASONS FOR GRANTING THE WRIT.....12

A. The Fourth Circuit Has Decided An Important Question Of Constitutional Law Which Has Not Been, But Should Be, Settled By This Court...13

B. Review By This Court Is Also Warranted Because The Fourth Circuit's Decision Conflicts With Decisions Of Other Courts Of Appeals Which Hold That Impermissible Acts Are Not Beyond Redress Merely Because They Occur At The Advisory Level...22

C. Under The Facts Of This Case, And In Light Of The Deference Due The Jury's Findings, The Petitioner Is Entitled To Judgment On The Verdict .....27

1. Ijaz Is Not As A Matter Of Law Insulated From Judgment By The Subsequent Votes Of The Thesis And Graduate Committees And Action By Gilmer....27

2. The Court Of Appeals Incorrectly Applied The Standard Set By This Court In Mt.Healthy And Price Waterhouse For Evaluating A Mixed-Motive Case.....30

CONCLUSION.....32

APPENDIX.....A-1

## TABLE OF AUTHORITIES

**Cases:**


**Page**

Bertot v. School District No. 1, Albany County, Wyo., 522 F.2d 1171 (10th Cir.1975).....25

Conner v. Reinhard, 847 F.2d 384 (7th Cir. 1988).....29

Darnell v. Ford, 903 F.2d 556 (8th Cir. 1990).....29

Gray v. Board of Higher Educ., City of New York, 692 F.2d 901 (2nd Cir. 1982).....25

Haimowitz v. University of Nevada, 579 F.2d 526 (9th Cir. 1978).....23,25,26

Johnson v. Duffy, 588 F.2d 740 (9th Cir. 1978.....28,29,30

Mt. Healthy City School Dist. Board of Education v. Doyle,429 U.S. 274, 97 S.Ct. 568, 50 L.Ed.2d 471 (1977).....passim

Peacock v. Duval, 694 F.2d 644 (9th Cir. 1982).....25

Price Waterhouse v. Hopkins, 490 U.S. 228, 109 S.Ct. 1775, 104 L.Ed.2d 268 (1989).....passim

Springer v. Seamen, 821 F.2d 871 (1st Cir. 1987).....29

Stevenson v. Koskey, 877 F.2d 1435 (9th Cir.1989).....29

**OTHER AUTHORITIES:**

28 U.S.C. §1254(1).....2

28 U.S.C. §1331.....3

28 U.S.C. §1343.....3

42 U.S.C. §1983.....28

First Amendment to U.S. Constitution.....passim

Fifth Amendment to U.S. Constitution.....3,13

Fourteenth Amendment to U.S. Constitution.....3,13

Constitution of Virginia, Article II, §11.....3

Constitution of Virginia, Article II, §12.....3

## APPLICABLE PROVISIONS OF LAW

### CONSTITUTIONAL PROVISIONS

The First Amendment to the United States Constitution provides in pertinent part, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof..."

The Fifth Amendment to the United States Constitution provides in pertinent part, "No person shall be...deprived of life, liberty, or property, without due process of law..."

The Fourteenth Amendment to the United States Constitution provides in pertinent part, "...nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

### STATUTORY PROVISIONS

42 U.S.C. §1983 provides in pertinent part, "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State...subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress..."

**IN THE**
**SUPREME COURT OF THE UNITED STATES**

OCTOBER TERM, 1990

---

**NO._____**

---

**AMER AL-ZUBAIDI,**

Petitioner

v.

**M. A. IJAZ, et al.,**

Respondents

---

**PETITION FOR A WRIT OF CERTIORARI TO THE JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT**

---

The petitioner, Amer Al-Zubaidi, respectfully requests that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit, entered in the above-entitled proceedings on November 6, 1990.

## OPINIONS BELOW

The per curiam opinion of the Court of Appeals for the Fourth Circuit is reported at 917 F.2d 1347 and is reprinted in the appendix. (App. A-1).

The unreported memorandum opinion of the United States District Court for the Western District Court of Virginia is reprinted in the appendix. (App. A-27).

## JURISDICTION

The judgment of the United States Court of Appeals for the Fourth Circuit was entered on November 9, 1990. This Court has jurisdiction pursuant to 28 U.S.C. §1254(1).

## STATEMENT OF THE CASE

A. The Proceedings Below

The petitioner, Amer Al-Zubaidi, a Shiite Muslim from Iraq, brought this action against Virginia Polytechnic Institute and State University (hereinafter

VPI), its president, and various faculty members in its Physics Department. Jurisdiction was based on 28 U.S.C. §§1331 and 1343 and the doctrine of pendant jurisdiction.

Al-Zubaidi alleged that the defendants had interfered with and prevented him from completing his doctoral dissertation due to his refusal to sign a religious statement, resulting in his termination from the doctoral program in physics at VPI. (App. A-3). Al-Zubaidi further claimed that these actions by the defendants had violated his rights of freedom of speech, religion, due process and equal protection of the laws as secured by the First, Fifth and Fourteenth Amendments to the U.S. Constitution and Article II, Sections 11 and 12 of the Constitution of Virginia.

The district court, by order dated January 30, 1987, granted summary judgment

to all defendants except one, M. A. Ijaz (hereinafter Ijaz), a professor in the VPI Physics Department and Al-Zubaidi's advisor. The court submitted the case to the jury on three special interrogatories as to liability:

> Do you find from a preponderance of the evidence that the defendant took action to prevent the plaintiff from obtaining his Ph.D. at Virginia Tech because plaintiff refused to sign the religious statement in evidence and/or because the plaintiff and the defendant belong to different religious sects?
>
> Do you find from a preponderance of the evidence that the defendant's discriminatory action proximately caused the plaintiff's termination from the Ph.D program at Virginia Tech?
>
> Do you find from a preponderance of the evidence that the plaintiff was capable of successfully completing the Ph.D program at Virginia Tech but for the defendant's discriminatory action?

The jury answered all three interrogatories affirmatively and then, in response to

another special interrogatory, found damages of $450,000. (App. A-13-14).

Ijaz filed a motion for judgment notwithstanding the verdict which the district court granted. (App. A-26-29). Al-Zubaidi appealed and the Fourth Circuit Court of Appeals, in a two to one per curiam decision, affirmed the granting of JNOV to the defendant.

B. The Facts In This Case

Al-Zubaidi entered the doctoral program at VPI in December, 1976, having received his Master's Degree from Penn State where he maintained a 3.51 grade point average. Al-Zubaidi completed his course work at VPI with a 3.6 average and then, in 1978, began work on his dissertation under the supervision of Dr. Parkinson, the chairman of the nuclear engineering department. Unfortunately, the reactor at VPI had a relatively low flux

and this made it difficult for him to complete his experiment.

In September, 1981, Parkinson went to Argentina to conduct research. The remaining members of Al-Zubaidi's thesis committee then presented him with a choice: either complete his experiment and dissertation within a few months, or form a new thesis committee, or resign from the graduate school. (App. A-32). Al-Zubaidi, believing he could not complete his experiment and dissertation in a few months with his advisor in Argentina, elected to form a new committee and begin again. Ijaz agreed to head Al-Zubaidi's new thesis committee and suggested a new topic of study, the decay scheme of mercury 188, which would necessitate doing experimental work at Oak Ridge National Laboratory.

In December, 1981, Ijaz gave Al-Zubaidi a religious declaration and asked

him to make copies of it, sign one and get other people to sign the other copies. (App. A-3, 8). Ijaz wanted to obtain financial support from Saudi Arabia, a Sunni Muslim country, to build a mosque at VPI. (App. A-8). The declaration was patently offensive to Shiite Muslims, as it required signers to declare that they were Sunni and abided by Sunni principles, stated that certain other people were Kafir (unbelievers) and Murted (able to be killed by true believers), and declared that "the Shia sect is completely mis-led." (App. A-13). Al-Zubaidi told Ijaz he could not sign it and Ijaz said nothing more at that time.

In March, 1982, Ijaz again brought up the religious declaration to Al-Zubaidi. This time he told Al-Zubaidi to delete the reference to the Sh'ia sect as being completely misled and then to sign it and

have his wife and friends sign it. Al-Zubaidi and his wife again refused to sign the declaration as it was still offensive to them. (App. A-8). Ijaz' response to Al-Zubaidi was "I don't know you." (App. A-8).

Al-Zubaidi had begun his experimental work at Oak Ridge and never received any complaints about his work there. On March 20, 1982, however, after a total of about twenty days of work at Oak Ridge, Ijaz told him to stop working on that topic. Ijaz then picked another topic, alpha decay, for Al-Zubaidi to work on for his dissertation. (App. A-22). This topic also required Al-Zubaidi to do work at Oak Ridge. (App. A-9).

From March until July of 1982 it was difficult for Al-Zubaidi to understand what Ijaz wanted him to do. Sometimes Ijaz said that he would take Al-Zubaidi to Oak Ridge

to do the experiment while other times he said he would get the data himself and then give it to Al-Zubaidi. (App. A-9). Eventually, despite a requirement in the physics department that students do their own experiments, Ijaz gave Al-Zubaidi a computer tape that purported to contain the data that he needed to do his dissertation. (App. A-9). The tape, however, had no energy level, which meant that it was useless. (App. A-9, 22). Ijaz never did take Al-Zubaidi back to Oak Ridge to do the work on alpha decay. On or about October 25, 1982, Ijaz forged Al-Zubaidi's signature on documents terminating Al-Zubaidi's access to Oak Ridge. (App. A-22).

Pursuant to Ijaz' instructions, Al-Zubaidi began writing his dissertation on alpha decay, although he still had no data. (App. A-9). Chapters one and two, which

were the introduction and explanation of the experiment to be performed, were completed in November, 1982. (App. A-9, 22). Chapter three was supposed to be the data from the experiment and chapter four was to explain the data. (App. A-9). On December 8, Al-Zubaidi gave Ijaz his draft of chapter 4, which he had been told by Ijaz to write despite not having any data to analyze. (App. A-9). On December 13, Ijaz told him that he would have to make an oral presentation on his dissertation two days later. (App. A-9). It was not common at that time for a student to be required to make such a presentation while his dissertation was in progress. (App. A-30).

Al-Zubaidi gave his oral presentation on December 15. Faculty members asked him some questions and he was able to answer them all. (App. A-10). Dr. Almeida, from Al-Zubaidi's thesis committee, thought that

Al-Zubaidi gave a good summary talk but that his project lacked original research. (App. A-30). Although Ijaz had possession of chapters one and two from Al-Zubaidi's incomplete dissertation, they were never shown to other faculty members who attended the presentation. (App. A-10, 23).

Knowing that he had withheld data from Al-Zubaidi and withheld Al-Zubaidi's partially completed dissertation from the rest of the thesis committee, Ijaz prepared a letter resigning from Al-Zubaidi's thesis committee, citing a lack of "creative scholarship" and "basic understanding and skill". (App. A-10). The other members of the committee also signed the letter, which was sent to the chairman of the graduate committee. None of the members of the thesis committee, other than Ijaz, had ever worked with Al-Zubaidi. (App. A-21).

The graduate committee met in light of

the resignation of Ijaz and Al-Zubaidi's thesis committee and recommended that he resign or be terminated as a graduate student at VPI. (App. A-17 n.4). Dr. Gilmer, the department head, notified Al-Zubaidi of the graduate committee's recommendation. Al-Zubaidi refused to resign, and he was terminated. (App. A-10).

**REASONS FOR GRANTING THE WRIT**

The Fourth Circuit's majority, per curiam, decision, if allowed to stand, will seriously undermine First Amendment rights long cherished by this Court. What the appeals court decided, in essence, was that the faculty advisor of a student in a State institution may, with impunity, grossly infringe upon that person's First Amendment rights to the point of causing him to be terminated from his position, so long as the final decision on termination rests

with someone other than the advisor. This decision goes against common sense, conflicts with the case law of several other circuits and fails to properly apply the standards set by this Court.

**A. THE FOURTH CIRCUIT HAS DECIDED AN IMPORTANT QUESTION OF CONSTITUTIONAL LAW WHICH HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT.**

Al-Zubaidi claimed, and proved, that he was terminated from the doctoral program in physics at V.P.I. because of the actions of Ijaz, which violated his rights of freedom of speech and religion as guaranteed by the First, Fifth and Fourteenth Amendments. Ijaz' defense was that Al-Zubaidi made no substantial showing of a causal connection between the alleged constitutionally impermissible acts and his termination and further, even if such a showing were made, Al-Zubaidi would have been terminated in any case due to his

academic deficiencies. This is thus a mixed-motives case for which the allocation of burdens and standard of review were set forth by this Court in Mt. Healthy City School Dist. Board of Ed. v. Doyle, 429 U.S. 274, 97 S.Ct. 568, 50 L.Ed.2d 471 (1977) and further explained in Price Waterhouse v. Hopkins, 490 U.S. 228, 109 S.Ct. 1775, 104 L.Ed.2d 268 (1989). This case presents to this Court for the first time the question of whether a plaintiff carries his initial burden under the Mt. Healthy standard when he presents credible evidence, which a jury accepts, that his protected conduct was a substantial or motivating factor in the actions of his advisor or supervisor and that those impermissible actions directly led to his termination. If he does carry his initial burden, then this Court is also presented with the question of whether the subsequent

decision to actually terminate him sufficiently attenuates the misconduct so as to relieve the advisor or supervisor from liability when the final decision, although made by someone else, is a product of the advisor's or supervisor's actions.

The initial burden here was upon Al-Zubaidi to show that his conduct was constitutionally protected and that the conduct was a "substantial" or "motivating" factor in the decision to terminate him. Mt. Healthy, 429 U.S. at 287; Price Waterhouse, 109 S.Ct. at 1790. This was done. Al-Zubaidi showed that Ijaz attempted to get him to sign a statement that was repugnant to his religious beliefs. Following Al-Zubaidi's refusal to sign the statement, Ijaz effectively sabotaged Al-Zubaidi's research, telling him to change topics and then forging his signature on documents to terminate his

access to Oak Ridge Nuclear Laboratory so that he could not do the needed research to compile data. Ijaz promised to provide Al-Zubaidi with the necessary information, but instead gave him useless blank data tapes. Ijaz ordered Al-Zubaidi to begin writing his dissertation without the benefit of data and then, in a move described by a member of the graduate committee as "not common" (App. A-30), required Al-Zubaidi to make an oral presentation to his thesis committee on the basis of his half-completed dissertation. Al-Zubaidi was given only two days' notice to prepare his oral presentation and Ijaz made himself unavailable during that time to assist in preparation of the presentation. Ijaz did not provide drafts of the completed portion of Al-Zubaidi's dissertation to the other members of the thesis committee but, the day after the presentation, he did provide

them with a letter he had written and signed resigning from Al-Zubaidi's thesis committee. (App. A-30). Ijaz conveniently provided signature lines on that letter for the other members of the thesis committee.

From this evidence it was entirely reasonable for the jury to conclude that Al-Zubaidi's religion and his refusal to sign the paper presented to him by Ijaz were substantial or motivating factors in Ijaz's subsequent conduct which, because of his position as advisor, then affected the recommendation by the thesis committee[1]. The graduate committee acted as a direct result of the resignation of the thesis committee (App. A-17) and Gilmer acted on the basis of these two recommendations. (App. A-10). Al-Zubaidi's termination from

---

[1] After the jury verdict, neither the respondent nor the courts have seriously questioned the fact of Ijaz' religious animus.

the graduate studies program is thus inexorably tied to Ijaz' unlawful conduct. The jury concluded this by answering "Yes" to special interrogatory number 2 as to which the court instructed that "injury or damage is proximately caused by an act or omission whenever it appears that the act or omission played a substantial part in actually bringing about or causing the injury or damage." (App. A-35) (emphasis added).

The burden then shifted to Ijaz to show by a preponderance of the evidence that the same decision would have been reached even in the absence of his unlawful conduct. Mt. Healthy, 429 U.S. at 287; Price Waterhouse, 109 S.Ct. at 1790. Importantly, Ijaz cannot prevail merely by offering a legitimate and sufficient reason for the termination; he must further show that this reason was the motivating factor

for the decision at the time of the decision. Price Waterhouse, 109 S.Ct. at 1791-1792.

Ijaz cannot meet this burden as all of the information before the thesis committee when it made its recommendation bore the imprimatur of Ijaz' unlawful actions. None of the other members of the committee had ever worked with Al-Zubaidi. Nor were they shown the draft of Al-Zubaidi's dissertation. The only evidence available to them upon which to base their evaluation of Al-Zubaidi was his brief oral presentation, contrived by Ijaz and doomed to failure by his orchestrations, and his own recommendation.

At trial none of the members of the thesis committee testified other than Ijaz. As the dissent below correctly noted, there was thus no evidence presented at all that the same decision to resign would have been

made absent the influence of Ijaz' unlawful actions. App. A-24 n.7. There was some evidence presented that the graduate committee and the school president took into account factors other than the thesis committee's decision to resign. However, it is clear that the impetus for their actions was the resignation of the thesis committee, which was the result of manipulations by Ijaz. It is reasonable to conclude, as the jury did, that absent Ijaz' sabotage of Al-Zubaidi's research, the thesis committee would not have resigned and the subsequent vote by the graduate committee would never have been taken[2].

---

[2] The Court of Appeals majority was required to engage in substantial fact finding on its own in order to avoid the consequences of the jury's answers to specific special interrogatories. As pointed out by the dissent, the majority ignored Al-Zubaidi's evidence, adduced not only through his own testimony and

Al-Zubaidi met his initial burden by showing that his protected conduct was a substantial or motivating factor of Ijaz'

---

documents, but through the cross-examination of the defendant's witnesses. (App. A-23 n.6). Thus, the majority ignored the fact that not a single committee member testified that his decision would have been the same "had he discounted Ijaz's participation in these events." (App. A-24 n.7). The majority also ignored, among other things, the fact that Al-Zubaidi's evidence established a legitimate explanation for the abandonment of his first dissertation project (App. A-31-32), that other students had taken up to nine years to complete their dissertations (App. A-33) and that one of the committee members, who, because of Ijaz, had no knowledge that Al-Zubaidi had no data to analyze, thought that Al-Zubaidi's presentation was good, but did not show originality. (App. A-30). The majority also ignored the impeachment of the defendant's evidence, such as the admission by one of the defendant's witnesses that he had no expertise in the area as to which he was testifying. (App. A-33-34). It was clearly the jury's province, not the Court of Appeals', to weigh the evidence and make determinations of credibility, and the jury had the right to discount the letters upon which the majority so heavily relied, since none of their authors were called and subjected to cross-examination.

actions and that Ijaz' impermissible actions directly led to his termination. The opinion by the court of appeals thus directly presents the question of whether a supervisor can escape liability under the Mt. Healthy standard merely by showing that he did not make the final decision when, in fact, the decision was the direct result of his acts. This Court should accept this case to answer whether such immunity for the violation of First Amendment freedoms really exists[3].

**B. REVIEW BY THIS COURT IS ALSO WARRANTED BECAUSE THE FOURTH CIRCUIT'S DECISION CONFLICTS WITH DECISIONS OF OTHER COURTS OF APPEALS WHICH HOLD THAT IMPERMISSIBLE ACTS ARE NOT BEYOND REDRESS MERELY BECAUSE THEY OCCUR AT THE ADVISORY LEVEL.**

---

[3] Although this case presents the issue in the student- faculty context, the issues are equally applicable to faculty employment or other employment contexts. Similarly, although this case arises under the First Amendment and 42 U.S.C. §1983, the analysis would be equally applicable to mixed motives cases in other contexts.

The majority's decision in this case ignores the "crucial consideration" pointed out by the dissent, namely "the enormous effect the evaluation made by the student's own advisor can have on other faculty members' opinions of the student's work." 917 F.2d at 1352. The Ninth Circuit, in direct conflict with the majority decision here, has recognized the impact that an initial recommendation can have on subsequent decisionmaking. Haimowitz v. University of Nevada, 579 F.2d 526 (9th Cir. 1978). In Haimowitz, a former assistant professor of music sued the university following the failure to renew his employment contract and grant him tenure. The dismissal was apparently precipitated by recommendations from the music department chairman and the faculty tenure committee. Id. at 527. One of the plaintiff's claims was that the adverse

recommendations arose from his exercise of First Amendment rights. Id. at 529-530. Defendants argued, and the district court accepted their contentions in granting summary judgment, that any impermissible retaliation against plaintiff was immaterial as it occurred only at the advisory level. Id. at 527, 530. The Appeals Court soundly rejected this argument:

> It is thought by the appellees that the improper bias is too far removed from the final decisionmaking to be of constitutional moment. Appellees have not cited any legal authority for their position. Rather, it appears that in cases where recommendations form the basis for the nonretention decision, this input is critical. Id. at 530.

The Tenth Circuit has also recognized, in the same context of non-renewal of an employment contract, the importance of the initial recommendation on subsequent official action:

> The recommendation to the Personnel

Committee, its recommendation to the Board, and the Board's reasons for non-renewal of her contract are of critical importance in deciding whether the action adverse to her was for exercise of her constitutional rights.

Bertot v. School District No. 1, Albany County, Wyo., 522 F.2d at 1181. The Ninth Circuit in Haimowitz, citing Bertot and another Tenth Circuit case, stated:

> The view expressed in these two cases is clearly more in tune with the practical realities of the decisionmaking process. The recommendation of the fellow members of a department will surely be a major, if not determinative, factor in the final employment or tenure decision.

579 F.2d at 530. See also, Peacock v. Duval, 694 F.2d 644 (9th Cir. 1982) (University President, acting on recommendation of department head, suspended professor. "[I]t is reasonable to presume that recommendations from department heads are usually of paramount importance." Id. at 647 n.3.); Gray v. Board of Higher Educ., City of New York, 692 F.2d 901 (2nd Cir. 1982) (University President, following peer review committee

recommendation, refused to rehire instructor. "Since the faculty has the primary responsibility for judging candidates, ...[the President] may simply rely, and will usually be relying, solely on the faculty committee's decision." Id. at 906 n.9).

Standing in stark contrast to these decisions from the Ninth, Tenth, and Second Circuits is the majority decision in the present case which never even considers the impact that an evaluation by a student's own thesis advisor can have on subsequent recommendations which rely heavily upon the initial evaluation[4]. The decision in Haimowitz cogently portends what happened here: the "practical realities of the

---

[4] Indeed, one of the respondent's own witnesses in this case, Dr. Clayton Williams of the Graduate Committee, testified to the nearly conclusive effect an advisor's resignation would have on a graduate student's career. (App. A-34).

decisionmaking process", 579 F.2d at 530, are that Ijaz orchestrated Al-Zubaidi's failure, the thesis committee followed Ijaz' lead in resigning, and the graduate committee acted on the basis of the thesis committee's resignation.

**C. UNDER THE FACTS OF THIS CASE, AND IN LIGHT OF THE DEFERENCE DUE THE JURY'S FINDINGS, THE PLAINTIFF IS ENTITLED TO JUDGMENT ON THE VERDICT.**

1. Ijaz Is Not As A Matter Of Law Insulated From Judgment By The Subsequent Votes Of The Thesis And Graduate Committees And Action By Gilmer.

There is ample precedent for a finding and award against Ijaz based upon the termination of Al-Zubaidi's graduate studies. The key question is not who ultimately terminated his studies, but rather what proximately caused the termination. Nor is this question inconsistent with the Mount Healthy standard which the Appeals Court

referenced, but faultily applied, in evaluating Al-Zubaidi's claim. Therefore there is no need, contrary to the suggestion of the dissent, to remand for further proceedings; rather a remand with instructions to reinstate the jury verdict is appropriate.

In Johnson v. Duffy, 588 F.2d 740 (9th Cir. 1978), the Court discussed the causal showing needed for a Section 1983 claim, saying that personal participation is not the only grounds for liability:

> The requisite causal connection can be established not only by some kind of direct personal participation in the deprivation, but also by setting in motion a series of acts by others which the actor knows or reasonably should know would cause others to inflict the constitutional injury.

588 F.2d at 743. In a subsequent decision, the Ninth Circuit said that this "proximate cause" doctrine announced in Johnson serves the same purpose as proximate cause does in torts, namely to establish the outer limits

of liability. Stevenson v. Koskey, 877 F.2d 1435, 1439 (9th Cir. 1989).

The Johnson articulation of the proximate cause standard has been cited with approval by the First Circuit, Springer v. Seamen, 821 F.2d 871 (1987), Seventh Circuit, Conner v. Reinhard, 847 F.2d 384 (1988) and Eighth Circuit, Darnell v. Ford, 903 F.2d 556 (1990). In Darnell, supra, a state police commander sued a state police major for allegedly violating his First Amendment rights by writing a disciplinary recommendation. The major's response was that it was the Superintendent and not him that was actually responsible for the discipline. The court of appeals, in dictum, indicated that the Johnson v. Duffy proximate cause standard would be appropriate to apply to a Mt. Healthy "but for" causation question. 903 F.2d at 562.

Ijaz had ample opportunity to present

evidence to show that the same decision would have been made in the absence of hi unlawful actions. Instead, he presented n evidence that the thesis committe considered any evidence other than tha tainted by his unlawful actions in reachin their decision to resign. Nor did h present any testimony that the graduat committee or Dr. Gilmer would have eve reviewed, much less terminated, Al-Zubaidi had the thesis committee not resigned. A the special interrogatories to the jur were appropriately phrased, Johnson v Duffy, supra, and there was substantia evidence to support the jury's decision this Court should exercise its supervisor power and reinstate the jury award.

2. The Court Of Appeals Incorrectl Applied The Standard Set By This Court I Mt. Healthy and Price Waterhouse Fo Evaluating A Mixed-Motives Case.

In Price Waterhouse, this Cour

discussed the burdens of a mixed-motives case and stated:

> Finally, an employer may not meet its burden in such a case by merely showing that at the time of the decision it was motivated only in part by a legitimate reason. The very premise of a mixed-motives case is that a legitimate reason was present...The employer instead must show that its legitimate reason, standing alone, would have induced it to make the same decision.

109 S.Ct. at 1791-1792. Here, the court of appeals stated: "The denying of data results and the withholding of two chapters of Al-Zubaidi's draft dissertation from the Ph.D. committee could possibly be construed as an act of sabotage against Al-Zubaidi's standing." (App. A-11). As the jury determined that this was the case, in answering "Yes" to special interrogatory 1, and a court considering a JNOV motion may not substitute its judgment for the jury's, these actions by Ijaz must be considered to constitute an impermissible interference

with Al-Zubaidi's doctoral studies. (App. A-23 n.6). The court of appeals implicitly found that Ijaz' impermissible acts played a part in the decision to terminate Al-Zubaidi, saying: "Thus, the decision to terminate Al-Zubaidi was not based only on the Ph.D. committee presentation." (App. A-12) (emphasis added). The decision by the majority, then, is inconsistent with the standard laid out by this Court in Price Waterhouse as there is no showing by Ijaz that legitimate reasons standing alone would have resulted in the same decision.

**CONCLUSION**

For the foregoing reasons, the petitioner, Amer Al-Zubaidi, respectfully requests that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit, entered in the above-entitled proceedings on November 6, 1990.

Respectfully submitted,

* GERALD T. ZERKIN

KELLEY H. BRANDT

ROBERT GODFREY

Linden Tower Professional Centre
Suite 108, 2nd and Franklin Streets
Richmond, Virginia 23219

* Counsel of Record

February 1991

**UNITED STATES COURT OF APPEALS**
**FOR THE FOURTH CIRCUIT**

---

NO. 89-1476

---

AMER AL-ZUBAIDI,

Plaintiff - Appellant,

versus

M. A. IJAZ,

Defendant - Appellee,

and

VIRGINIA POLYTECHNIC INSTITUTE AND STATE UNIVERSITY; KAZUO GOTOW; RICHARD A. ARNDT; S.P. ALMEIDA; JOHN R. FICENEC; C. D. WILLIAMS; L. DAVID ROPER; T. K. LEE; WILLIAM LAVERY; THOMAS E. GILMER, JR.

Defendants.

---

Appeal from the United States District Court for the Western District of Virginia, at Roanoke. James C. Turk, Chief District Judge. (CA-85-83-R)

---

Argued: April 6, 1990
Decided: November 6, 1990

---

Before RUSSELL and MURNAGHAN, Circuit Judges, and GARBIS, United States District Judge for the District of Maryland, sitting by designation.

---

Affirmed by published per curiam opinion. Judge Garbis wrote a dissenting opinion.

---

**ARGUED:** Gerald Thomas Zerkin, GERALD T. ZERKIN & ASSOCIATES, Richmond, Virginia, for Appellant. Jerry Dean Cain, III, General Counsel and Special Assistant Attorney General, VIRGINIA POLYTECHNIC INSTITUTE AND STATE UNIVERSITY, Blacksburg, Virginia, for Appellee. **ON BRIEF:** Karen Ely-Pierce, GERALD T. ZERKIN & ASSOCIATES, Richmond, Virginia, for Appellant. Mary Sue Terry, Attorney General, Richmond, Virginia; Kay Heidbreder, Associate General Counsel and Special Assistant Attorney General, VIRGINIA POLYTECHNIC INSTITUTE AND STATE UNIVERSITY, Blacksburg, Virginia, for Appellee.

---

PER CURIAM:

Amer Al-Zubaidi is a former physics student who was pursuing his doctorate at Virginia Tech until his studies were terminated by a committee of the physics department. In this suit, he claimed that he was terminated because of discrimination against him based upon his religion. Below, the jury found for Al-Zubaidi and awarded him $450,000 in damages. The district judge reversed this verdict and granted JNOV for the defendant. Al-Zubaidi appealed this ruling, and argues that JNOV was not proper. We find that the district judge correctly granted JNOV, and affirm.

During the latter years of his graduate studies, Al-Zubaidi was supervised by Professor M. A. Ijaz. Al-Zubaidi and Ijaz are both Muslim; however, Al-Zubaidi is a Shi'ite Muslim, whereas Ijaz is a Sunni Muslim. In this suit, Al-Zubaidi

claimed that Ijaz discriminated against him because the two are of different Muslim sects, and that this discrimination caused Al-Zubaidi's dismissal from Virginia Tech. At trial, it was established that Ijaz attempted to get Al-Zubaidi to sign a petition asserting the correctness of the Sunni beliefs, and that Ijaz further requested that Al-Zubaidi gather the signatures of other Muslims. Al-Zubaidi refused, and in this suit he claimed that Ijaz sabotaged his graduate studies because of that refusal.

The issue at trial, during the post-trial motions, and now on appeal, is whether discrimination by Ijaz caused Al-Zubaidi's termination. In granting the defendant's motion for JNOV, the district judge found that the evidence overwhelmingly proved that Al-Zubaidi would have been terminated regardless of how Ijaz

acted toward Al-Zubaidi. The judge noted that the plaintiff's doctoral committee was composed of four persons including Ijaz and found that Ijaz's lone vote would have been insufficient to terminate Al-Zubaidi from the physics program. In this appeal, Al-Zubaidi argues that Ijaz deliberately poisoned the entire doctoral committee against him, so that all of the voters were the product of discrimination. Ijaz counters that it was well known in the physics department that Al-Zubaidi was a poor graduate student, that the committee primarily terminated Al-Zubaidi for that reason, and that any prejudicial actions taken by him had little effect. We agree that the record establishes that Al-Zubaidi's termination was not caused by discriminatory action by Ijaz, and affirm the granting of JNOV by the district judge.

Before we discuss our decision, one

procedural note is in order. Al-Zubaidi originally filed his suit against Ijaz, the members of the doctoral committee, and Virginia Tech. On defendants' motion for summary judgment, the district judge dismissed all of the defendants except Ijaz. The court ruled that there is no vicarious liability in a Section 1983 action, and thus the other defendants could not be liable since there was no evidence of discrimination on their part. On appeal, Al-Zubaidi does not dispute that legal premise. However, he asserts that these are necessary parties for the fashioning of an equitable remedy of reinstatement as a student. The appellee responds that an order of reinstatement would not be appropriate, because it would effectively order Virginia Tech to process and graduate Al-Zubaidi regardless of his ability. Because we are upholding the

decision that Al-Zubaidi's termination was not caused by discrimination, we do not reach that issue.

I.

In considering a JNOV motion, the trial may not weigh the credibility of witnesses or weigh evidence. Whalen v. Roanoke County Bd. of Supervisors, 769 F.2d 221, 226 (4th Cir. 1985), rev'd on other grounds, 797 F.2d 170 (4th Cir. 1986) (en banc). Also, the district judge may not base a grant of JNOV on materially contradicted evidence. Lust v. Clark Equipment Co., 792 F.2d 436, 440 (4th Cir. 1986). Finally, the court may not substitute its judgment for the jury's. However, the jury may only draw inferences from the evidence that are "reasonably probable," and "mere speculation is insufficient" to support a verdict. Austin v. Torrington Co., 810 F.2d 416, 420 (4th

Cir. 1987).

In this case, the district judge found that the jury's verdict was contrary to the evidence. The district judge granted JNOV because the evidence clearly did not satisfy the "but for" test set forth in Mt. Healthy City School Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 285-86 (1977).

Although the district judge did not recount the evidence of Al-Zubaidi's shaky academic record in his memorandum opinion granting JNOV, the evidence in the record supporting that position is strong. Al-Zubaidi had begun his Ph.D. program at Virginia Tech in December 1976. Be September of 1981, Al-Zubaidi had performed well in the classroom but had performed poorly in academic research, which was an indispensable part of his studies. Al-Zubaidi's grades were good; he had earned a 3.51 grade point average at Penn State

while obtaining his master's degree in physics, and he earned a 3.6 at Tech in his classroom studies. Al-Zubaidi's downfall came in the laboratory, however--not the classroom. For the first three years of his studies, he put in far less time in the lab than is expected of a satisfactory graduate student. He later picked up the pace, but proved to be weak outside the classroom and, also, dangerous. Because of his poor skills in using Tech's nuclear reactor, in September of 1981 the University Reactor Safety Committee forced Al-Zubaidi to complete successfully a reactor safety program before he could again handle radioactive material or alter or move shielding without approval.

After Al-Zubaidi had been at Tech for two years, Physics Professor W. Peter Trower requested that the graduate committee terminate his studies. Al-

Zubaidi had been assigned to aid Trower in grading tests in his "Physics As A Liberal Arts" class, a low level course. Trower wrote the committee to state that Al-Zubaidi was incapable of performing the task. He states that Al-Zubaidi "had neither the talent not the temperament to benefit either me or the student in this course." He added that Al-Zubaidi "showed precious little understanding of the most basic physics ideas nor was he able to demonstrate any ability to learn even when encouraged to do so." He also commented that "[e]ven making generous allowances for the cultural differences, I predict that Al-Zubaidi will never be able to perform, even marginally, as a practicing physicist." Despite this recommendation, Al-Zubaidi remained as a student. Yet, after being at Tech for five years, it appears that his skills had not improved.

In a letter to an associate dean of the graduate school dated September 21, 198 Associate Physics Professor Samuel P. Bow assessed Al-Zubaidi's progress in his l work in his research. The report w critical of Al-Zubaidi's progress a summed up its assessment by stating th "many of my colleagues and I do not jud that Mr. Al-Zubaidi's talents are we adapted to physics research."

Bowen wrote this letter as part of evaluation of whether Al-Zubaidi shou continue on his current research project start a new project. Al-Zubaidi elected select a new topic and committe Approximately one month later, on Octob 15, 1981, the chairman of Al-Zubaidi Ph.D. Advisory Committee, Profess Parkinson, resigned. Parkinson h departed Tech to work on his own physi research in Argentina. In Parkinson's

letter to Al-Zubaidi discussing the future of Al-Zubaidi's studies, Parkinson complained that Al-Zubaidi had taken so much of his time that he had not been able to attend to his other responsibilities adequately. We do not know how much of an influence Al-Zubaidi's time-consuming presence was on Parkinson's decision to resign and leave for Argentina; however, it clearly had an impact. In December of 1982, Parkinson provided a short evaluation of Al-Zubaidi's abilities based upon the almost four years that Parkinson served as chairman of Al-Zubaidi's Ph.D. committee. Parkinson stated that Al-Zubaidi's progress had been slow, that Al-Zubaidi required a great deal of assistance with the reactor, that Al-Zubaidi occupied more of Parkinson's time than any other doctoral student that Parkinson had ever counseled, and that Al-Zubaidi had good theoretical

skills but was "poorly qualified for experimental research."

After Parkinson's resignation, Al Zubaidi was in need of a new Ph.D committee chairman and a new committee. H approached Professor Ijaz, who agreed t form a committee and to chair it. I addition to working with Al-Zubaidi, Ija attempted to persuade Al-Zubaidi to sign declaration that would indicate that Al Zubaidi was a firm Sunni Muslim. Ijaz wa attempting to gather signature demonstrating a strong Sunni Musli presence at Tech so that the government o Saudi Arabia might provide financia support for the building of a mosque an school for Muslim students in th surrounding area. Al-Zubaidi refused t sign, because that declaration conflicte with his Shi'ite beliefs, and he als refused to try to obtain signatures from

his wife, other students and faculty members. After Al-Zubaidi gave Ijaz his final decision that he would not sign the petition, Al-Zubaidi claims that Ijaz responded by saying "I don't know you." Al-Zubaidi says this meant that Al-Zubaidi was now a non-person so far as Ijaz was concerned.

Circumstantial evidence presented at trial inferred that Ijaz attempted to undercut Al-Zubaidi's standing in the physics department because of Al-Zubaidi's refusal to cooperate in the petition drive. Al-Zubaidi was to conduct his research under Ijaz at the Oak Ridge National Laboratory, yet it appears that Ijaz stonewalled Al-Zubaidi's efforts to conduct that research. Ijaz attempted to block Al-Zubaidi's access to Oak Ridge, sometimes saying that he would take Al-Zubaidi back to that facility, and sometimes saying that

he would obtain the research data from Oak Ridge himself. However, Ijaz never provided this assistance. Even when Al-Zubaidi requested that Ijaz retrieve the computer data tape and computer program that Al-Zubaidi was using at Oak Ridge, Ijaz failed to produce. Ultimately, Ijaz produced several useless tapes, which, according to Al-Zubaidi, had no data on them.

Despite this lack of data, Al-Zubaidi began writing his dissertation pursuant to Ijaz's direction. Apparently, Al-Zubaidi was able to write the first two chapters without difficulty. The third chapter was supposed to contain the data that he did not have, and chapter four was supposed to explain the data from chapter three. Despite this lack of data, Al-Zubaidi attempted to draft a chapter four based upon his predictions, although he was

unable to draft a chapter three. Upon reviewing Al-Zubaidi's writing, Ijaz found that chapter four was unsatisfactory and indicated that he wanted to see Al-Zubaidi again on the following Monday, which was three days away. Al-Zubaidi was not told of the purpose of the Monday meeting; however, when he came in on that day, Ijaz informed him that he would be giving a presentation about his dissertation to his Ph.D. committee in two days, on a Wednesday. Al-Zubaidi was upset over this planned meeting, since he had not received any data or finished his dissertation. Yet, Al-Zubaidi did give a presentation and answered questions that Wednesday. The record does not reflect whether these questions were answered correctly. Eventually, Ijaz ended the presentation, and Al-Zubaidi was excused. Although Al-Zubaidi was not privy to the committee's

discussions, he did learn that Ijaz did not give the committee copies of his draft of the first two chapters of his dissertation. Following the Al-Zubaidi presentation, the Ph.D. committee met and decided to resign. The four members of the committee then issued a short statement to the Chairman of the Graduate Committee indicating their reasons for resigning. They indicated that Al-Zubaidi did "not have the basic understanding and skill to pursue a Ph.D. in nuclear physics," "that he ha[d] not shown much progress independently," and that he had failed to exhibit "creative scholarship." After receiving the recommendation, the head of the physics department, Dr. Gilmer (who was not on Al-Zubaidi's committee), wrote to Al-Zubaidi informing him of the resignation of his Ph.D. committee, and asking Al-Zubaidi to resign. In his letter, Gilmer indicated

that he was not asking Al-Zubaidi to leave because of the resignation of his Ph.D. committee. Instead, Gilmer indicated that all of the faculty members that were closely connected with Al-Zubaidi's research at Tech had no confidence in him. Importantly, the graduate committee had indicated to Gilmer that there was little prospect of Al-Zubaidi meeting expected research standards. Al-Zubaidi refused to resign and was terminated.

As an aside, as Al-Zubaidi's termination was nearing, Oak Ridge indicated that Al-Zubaidi should not return until his skills had improved substantially. In response to an inquiry by Ijaz, an Oak Ridge official indicated that Al-Zubaidi had no competency in computer programs, that he could not understand various physics concepts, that he made little progress learning things

taught him at Oak Ridge, and that he had become a nuisance to the Oak Ridge staff.

Based upon this factual pattern, we find that the district judge was correct in granting JNOV. Admittedly, the evidence indicates that Ijaz was not helpful to Al-Zubaidi once Al-Zubaidi refused to sign Ijaz's petition. The denying of data results and the withholding of two chapters of Al-Zubaidi's draft dissertation from the Ph.D. committee could possibly be construed as an act of sabotage against Al-Zubaidi's standing. Al-Zubaidi argues that these acts prevented the committee from getting a true picture of Al-Zubaidi's abilities and research abilities.

We reject that argument. The record indicates clearly that Al-Zubaidi was always a poor researcher, which is an indispensable skill in working on a Ph.D. in physics. Dr. Trower had recommended Al-

Zubaidi's termination as early as 1978 because of a perceived lack of ability. Dr. Parkinson came to this same conclusion after four years of chairing Al-Zubaidi's Ph.D. committee. Officials at the Tech reactor and at Oak Ridge had no confidence in Al-Zubaidi's abilities. These poor reviews were not the result of any antagonism by Ijaz. We agree that if Ijaz sought to sink Al-Zubaidi, then Ijaz was attempting to sink a ship that already was sinking. Indeed, the record indicates that the graduate committee's decision to recommend the termination of Al-Zubaidi was based on Al-Zubaidi's entire file, not just on the presentation made to the Ph.D. committee. It also indicates that Dr. Gilmer attempted to gather a sample of opinion on Al-Zubaidi outside of his final Ph.D. committee before proceeding with the termination. Thus, the decision to

terminate Al-Zubaidi was not based only on the Ph.D. committee presentation. Despite his success in the classroom, Al-Zubaidi had simply failed as a researcher.

Accordingly, we affirm the dismissal of this case. The record regrettably indicates that Al-Zubaidi's downfall was attributable to his lack of research ability.

**AFFIRMED**

GARBIS, District Judge, dissenting:

I respectfully dissent.

As the court's opinion indicates, Amer Al-Zubaidi was terminated from the graduate program in physics at Virginia Tech in January 1983. Al-Zubaidi, a Shi'ite Muslim, alleged that his termination was caused by religious discrimination against him by his advisor, M.A. Ijaz, a Sunni Muslim.[1] The jury's verdict in favor of Al-Zubaidi was based on a special verdict form, in which the jury answered the following questions:

---

[1] There is a deep religious schism between Shi'ite and Sunni Muslims. The activities of Ijaz proven in this case demonstrate the enmity between these two groups. The statement that Ijaz asked Al-Zubaidi to sign not only indicated that Shi'ites like Al-Zubaidi are "completely misled," but went on to state that they were "Kafir" and "Murted," or unbelievers, who can be killed by other Muslims. J. A. 185.

> 1. Do you find from a preponderance of the evidence that the defendant took action to prevent the plaintiff from obtaining his Ph.D. at Virginia Tech because plaintiff refused to sign the religious statement in evidence and/or because the plaintiff and the defendant belong to different religious sects?
>
> 2. Do you find from a preponderance of the evidence that the defendant's discriminatory action proximately caused the plaintiff's termination from the Ph.D. program at Virginia Tech?
>
> 3. Do you find from a preponderance of the evidence that the plaintiff was capable of successfully completing the Ph.D. program st Virginia Tech but for the defendant's discriminatory action?

J.A. at 453-54. The jury answered "yes" to all of these questions and awarded Al-Zubaidi $450,000 in damages.[2] After the

---

[2] Despite my decision on the merits of the case, I admit to some skepticism as to the amount of damages awarded by the jury. However, the appellee did not file a cross appeal regarding the size of the jury verdict, assuming it were to be reinstated, and the issue is not before

jury verdict, the district judge granted JNOV in favor of the defendant. The plaintiff appeals.

The proper standard for evaluating Al-Zubaidi's claim is drawn from Mt. Healthy City School Dist. Bd. of Educ. v. Doyle, 429 U.S. 274 (1977). See Appellee's Br. at 8-9; Appellant's Reply Br. at 11. The Supreme Court stated that:

> [T]he burden was properly placed upon the respondent to show that his conduct was constitutionally protected, and that this conduct was a "substantial factor"--or, to put it in other words, that it was a `motivating factor' in the Board's decision not to rehire him. Respondent having carried that burden, however, the District Court should have gone on to determine whether the Board had shown by a preponderance of the evidence that it would have reached the same decision as to respondent's reemployment in the absence of the protected conduct.

429 U.S. at 287 (footnote omitted).

---

this court at this time.

In ruling on the appellee's motion for JNOV, the district court wrote:

> [T]here was no evidence that the other members of the plaintiff's doctoral committee were influenced by any religious discrimination on the part of Dr. Ijaz. The decision to terminate plaintiff from the Ph.D. program was a committee decision requiring more than one vote in favor of termination. Therefore, the defendant's lone vote, even if the product of religious discrimination, would have been insufficient to cause the plaintiff to be terminated from the program.

J.A. at 460. Additionally, the instructions to the jury indicated that the "proximate cause" test for answering question No. 2 was met when an "act or omission played a substantial part in actually bringing about or causing the injury or damage." J.A. at 370 (emphasis added).[3]

---

[3] The proximate cause standard used by the district court is not the same as the one articulated in Mt. Healthy. The district court opinion granting JNOV did

The district court thus based its opinion granting JNOV on the notion that even though Ijaz was motivated by religious

---

not indicate the appellee had proven that Al-Zubaidi would have been terminated even in the absence of Ijaz's discrimination. The jury instructions and special verdict form did not phrase the standard in that way, either. To say that Al-Zubaidi was "capable of successfully completing the program" is not the same as saying that Ijaz had proven the program would have terminated Al-Zubaidi even without Ijaz's own discriminatory involvement.

The posture on appeal of any issue regarding the standard used below is unclear. Appellant argues that the district court applied the proper standard. Appellee argues that the district court's phrasing is incorrect, but that the parties waived any claim based on the improper standard by not contesting it below.

What is clear is that the majority attempts to ignore the error below by indicating the district court "granted JNOV because the evidence clearly did not satisfy the `but for' test set forth" in Mt. Healthy. Slip op. at 5. The district court did not make the finding Mt. Healthy requires. Since I would reverse the grant of JNOV and remand for further proceedings, as I indicate below, I would instruct the district court to use the proper standard in considering the matter on remand.

discrimination in his actions towards Al-Zubaidi, he cast only one "lone vote" on the thesis committee. Therefore, according to this theory, his vote alone would not have been sufficient to terminate Al-Zubaidi, since three others voted in favor of termination. Moreover, subsequent action taken by the Graduate Committee and Dr. Gilmer leading to Al-Zubaidi's termination was taken without Ijaz's involvement.[4]

The majority adopts the principle that the final decision to terminate Al-Zubaidi was insulated from the effects of Ijaz's discriminatory conduct:

---

[4] The thesis committee consisted of Ijaz as chairman and Professors Arndt, Almeida and Gotow. After that committee resigned, the Physics Graduate Committee, consisting of Professors Ficenec, Lee, O'Dell and Williams, met to review Al-Zubaidi's status. Gilmer, the chairman of the physics department, ultimately made the decision to terminate.

> [T]he graduate committee's decision to recommend the termination of Al-Zubaidi was based on Al-Zubaidi's entire file, not just on the presentation made to the Ph.D. committee. It also indicates that Dr. Gilmer attempted to gather a sample of opinion on Al-Zubaidi outside of his final Ph.D. committee before proceeding with the termination. Thus, the decision to terminate Al-Zubaidi was based not only on the Ph.D. committee presentation.

Slip. op. at 11-12. Thus, because Dr. Gilmer relied on other sources in addition to Ijaz and the thesis committee in deciding to terminate Al-Zubaidi, the majority upholds that decision.

I dissent because this court affirms the district court's decision on this point without mentioning a crucial consideration for evaluating an academic committee's review of a student's work. The majority discounts the enormous effect the evaluation made by the student's own advisor can have on other faculty members'

opinions of the student's work.

In fact, in declining to address this issue, the majority chooses not to discuss a case cited to the court by the appellant that directly supports the appellant. In Haimowitz v. University of Nevada, 579 F.2d 526 (9th Cir. 1978), the plaintiff alleged he was terminated in retaliation for having lodged allegations of grade improprieties against his department chairman, and for having counseled a student to report to the dean another department member's alleged sexual advances towards her. Id. at 530. The Ninth Circuit rejected the appellees' claim that if discriminatory conduct occurred only at the advisory level, the ultimate decision is insulated from attack. The court wrote:

> The district court, and now the appellees,. . .argu[e] that any retaliation was only at the advisory level. It is thought by the appellees that the improper bias is too far removed

from the final decision making to be of constitutional moment. Appellees have not cited any legal authority for their position. Rather, it appears that in cases where recommendations form the basis for the nonretention decision, this input is critical. For example, in Bertost v. School District No. 1, Albany County, Wyoming, 522 F.2d 1171, 1181 (10th Cir. 1975), the court said:

> The recommendation to the Personnel Committee, its recommendations to the Board, and the Board's reasons for non-renewal of the contract are of critical importance in deciding whether the action adverse to her was for the exercise of her constitutional rights.

See also Smith v. Losee, 485 F.2d 334, 336-40 (10th Cir. 1973), Cert. denied, 417 U.S. 908 . . . (1974).

The view expressed in these two cases is clearly more in tune with the practical realities of the decisionmaking process. The recommendation of the fellow members of a department will surely be a major, if not determinative, factor in the final employment or tenure decision.

Id. at 530. The court reversed the grant of summary judgment and returned the matter for factfinding on the merits.

Similarly, in upholding the district court's grant of JNOV, the majority ignores the substantial effect Ijaz's actions and opinions must have had on the thesis committee members evaluating Al-Zubaidi's performance. The poor quality of Al-Zubaidi's laboratory work was the primary reason cited for his discharge. In judging that work, the committee must have relied on Ijaz's input, since, as Al-Zubaidi's thesis advisor, he would have been in the best position to evaluate Al-Zubaidi's research abilities.[5]

---

[5] Although the majority recognizes that Al-Zubaidi's termination was based on his failure to perform in the laboratory and that his academic performance was adequate, see slip op. at 6, the majority tries to bolster its opinion with an evaluation of Al-Zubaidi's academic performance made five years before the actual termination. In attacking Al-

The record demonstrates the ways in which Ijaz's actions and recommendations regarding Al-Zubaidi affected the judgment of the other faculty members. The thesis committee's evaluation of Al-Zubaidi's work would have been based primarily on Ijaz's insights into his capabilities. None of the thesis committee members had any personal familiarity with Al-Zubaidi's work. Ijaz did not provide them with copies of the written work Al-Zubaidi had

---

Zubaidi's capabilities, the majority quotes extensively from a report by Professor Trower following a course in which Al-Zubaidi was his teaching assistant. Slip op. at 6-7. Even if Trower's opinions were correct at that time, after this experience Al-Zubaidi took and passed his second set of preliminary exams, demonstrating his fundamental academic knowledge of the field as a whole. Even the appellee does not challenge Al-Zubaidi's classroom skills, claiming instead that the faculty's decision to terminate Al-Zubaidi was based on his research and laboratory skills. It is difficult to see how the Trower passage adds any support to the majority's ruling.

completed. Their only direct familiarity with Al-Zubaidi's work was the brief oral presentation Ijaz had hastily arranged. Given that Ijaz was the conduit to the committee for information about Al-Zubaidi's work, the jury was free to conclude that the other faculty members sitting on these committees did not exercise their own independent judgment in evaluating Al-Zubaidi, but simply rubber-stamped Ijaz's discriminatorily inspired abandonment.

Given that Mr. Healthy places the burden on the defendant to prove the discriminatory conduct had nothing to do with Al-Zubaidi's termination, the district judge effectively granted a directed verdict in favor of defendant on a claim defendant was required to prove. However, as in Haimowitz, neither the majority, the district court, nor the appellee has cited

any authority at all for the proposition that Ijaz's influence stops as a matter of law with his own "lone vote." I would reverse and remand to require the district court to consider, under the proper standard, how far that influence was felt.

In addition, I dissent because I believe the record provides substantial evidence to support the jury's verdict under the Mt. Healthy standard. Ijaz clearly sabotaged Al-Zubaidi's experimental research work, and it would have been reasonable for the jury to conclude that any faculty decisions based on the progress of his research to that point must have been tainted by the roadblocks Ijaz threw up to get back at Al-Zubaidi. After Al-Zubaidi first declined to sign Ijaz's petition rejecting Shi'ite beliefs in December 1981, Ijaz required Al-Zubaidi to change topics, from the decay of mercury to

alpha decay. Ijaz provided tapes without any data on them for Al-Zubaidi to use in preparing his analysis, which meant Al-Zubaidi had no raw material to work with. In fact, without Al-Zubaidi's knowledge, Ijaz signed Al-Zubaidi's name to an agreement with Oak Ridge National Laboratories terminating Al-Zubaidi's privileges with the lab. This effectively prevented Al-Zubaidi from gathering any more data on his own, without relying on Ijaz himself.

In arranging the meeting with the thesis committee to review Al-Zubaidi's progress, Ijaz created an atmosphere that was least likely to lead to a positive evaluation of Al-Zubaidi's work. After Al-Zubaidi provided the first two chapters of the dissertation, Ijaz initiated the thesis committee meeting. However, because Ijaz obstructed his attempts to obtain data from

Oak Ridge, Al-Zubaidi could not complete the next two chapters, in which he would have analyzed that data. Ijaz gave Al-Zubaidi only two days to prepare, and he remained unavailable to assist Al-Zubaidi during that time. And although Al-Zubaidi had completed those first two chapters, Ijaz failed to provide drafts of them to the committee. The opinions of the thesis committee were thus formed by a presentation Ijaz himself had initiated, but simultaneously hindered. Therefore, the committee members' opinions of Al-Zubaidi's work, even aside from Ijaz's personal opinion, were unavoidably colored by Ijaz's conduct.

Ijaz's negative evaluation of Al-Zubaidi's research skills and his efforts to stymie Al-Zubaidi's research progress must be presumed to have been motivated by

religious discrimination.[6] Therefore, any subsequent reviewer's evaluation which placed any weight on Ijaz's recommendation or on the recommendation of the thesis committee as a whole would be tainted by

---

[6] The majority apparently does not wish to acknowledge that Ijaz actually and intentionally discriminated against Al-Zubaidi on the basis of their religious differences, even though the jury found such discrimination and even though that jury finding is not contested on appeal. The majority grudgingly "admits" that "the evidence indicates that Ijaz was not helpful to Al-Zubaidi once Al-Zubaidi refused to sign Ijaz's petition," and it concedes that Ijaz' actions "could possibly be construed as an act of sabotage against Al-Zubaidi's standing." Slip op. at 11 (emphasis added).

I submit that the majority ought to accord appropriate deference to the jury's answer to special interrogatory No. 1 and accept that Ijaz did in fact actually discriminate against Al-Zubaidi. Only then can the court focus on the real issue before it, which is whether that discrimination tainted the subsequent decision to terminate Al-Zubaidi. Even if the majority is skeptical about Al-Zubaidi's potential as a physicist, it should not overlook a clear jury finding of discrimination that is not being challenged on this appeal.

that improper motivation and could not be considered in evaluating the merits of the termination. The only way to avoid the widespread taint of Ijaz's religious animus would be to determine that the Graduate Committee and Department Chairman Gilmer would have acted as they did without relying at all on Al-Zubaidi's lack of data, or on the thesis committee's decision to resign. Under the standard set forth in Mt. Healthy, appellee had the burden to prove that the ultimate decision to terminate Al-Zubaidi would have been made anyway, without any reliance on Ijaz's discriminatory conduct and all its subsequent results.[7]

---

[7] It is difficult to see how appellee could have met this burden. Not one of the participants on the committees evaluating Al-Zubaidi stated that his decision would have been the same had he discounted Ijaz's participation in these events. The appellee simply did not offer the proper testimony to carry the burden he bears under Mt. Healthy.

I submit that the matter should be remanded for the district court to decide the motion for JNOV under the proper Mt. Healthy standard while giving due consideration to the influence Ijaz's discriminatorily inspired actions may have had on the ultimate termination decision. Given the enormous influence a faculty advisor's opinions can have, as noted in Haimowitz, I believe it is simply incorrect to say as a matter of law that Ijaz counted as only one vote when the thesis committee he chaired evaluated a student he advised, or that Ijaz's influence ended with the single vote he cast. Under the proper Mt. Healthy standard, the defendant was required to show that the University would not have terminated Al-Zubaidi in the absence of Ijaz's discrimination and all the effects which flowed from it. I believe that enough evidence exists in the

record to support the jury's verdict for Al-Zubaidi and their finding of causation.

For the foregoing reasons, I respectfully dissent from the majority's decision.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ROANOKE DIVISION

| | | |
|---|---|---|
| AMER AL-ZUBAIDI, Plaintiff, | ) | C.A. NO. 85-0083-R |
| v. | ) | **FINAL JUDGMENT AND ORDER** |
| M. A. IJAZ, Defendant. | ) | |

In accordance with the memorandum opinion filed this day, it is hereby

ADJUDGED AND ORDERED

that defendant's motion for judgment notwithstanding the verdict shall be and hereby is GRANTED and judgment entered in favor of the defendant.

The Clerk of Court is directed to strike this case from the Court's active docket and to send certified copies of this order and the accompanying memorandum opinion to counsel of record.

ENTER: This 5th day of June, 1989.

/s/ James C. Turk
Chief U. S. District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ROANOKE DIVISION

| | | |
|---|---|---|
| AMER AL-ZUBAIDI, | ) | |
| | ) | |
| Plaintiff, | ) | CA NO. 85-0083-R |
| | ) | |
| v. | ) | **MEMORANDUM OPINION** |
| | ) | |
| M. A. IJAZ, | ) | BY: Honorable James |
| | ) | C. Turk, Chief |
| Defendant. | ) | U.S. District |
| | ) | Judge |

Plaintiff filed his complaint in this case alleging that his termination from the doctoral program at Virginia Tech was motivated by religious discrimination. The case was tried before a seven-member jury from February 15, 1989 to February 17, 1989. The jury returned its verdict by way of Special Interrogatory Verdict Form, finding that the defendant took action to prevent the plaintiff from obtaining his Ph.D. at Virginia Tech because of plaintiff's religion, that the defendant's discriminatory action proximately caused

the plaintiff's termination from the Ph.D. program, and that plaintiff was capable of successfully completing the Ph.D. program but for the defendant's discriminatory action. The jury awarded damages to plaintiff in the amount of four hundred fifty thousand dollars ($450,000.00). The case is now before the Court on the defendant's motion for judgment notwithstanding the verdict. The parties have submitted briefs on the motion, the Court has heard oral arguement, and the matter is ripe for decision.

The standard for granting a motion for judgment notwithstanding the verdict is the same as that for granting a directed verdict. Hawkins v. Sims, 137 F.2d 66 (4th Cir. 1943). The motion should be granted where "there are no controverted issues of fact upon which reasonable minds could differ." Proctor & Colonial Refrigerated

Transportation, Inc., 494 F.2d 89 (4th Cir. 1974). The jury's findings of fact can only be upheld when they are supported by evidence which shows a "probability" and not a mere "possibility" of discrimination. See Mayberry v. Dees, 663 F.2d 502, 510 (4th Cir. 1981) (quoting Ralston Purina Co. v. Edmunds, 241 F.2d 164, 168 (4th Cir.), cert. denied 353 U.S. 974 (1957). See also Whalen v. Roanoke County Board of Supervisors, 797 F.2d 171 (4th Cir. 1986), adopting opinion of Judge Ervin (concurring in part and dissenting inpart) at 769 F.2d 221, 226 (4th Cir. 1985).

Applying this standard, the Court finds that the evidence at trial was insuffucient to support the jury verdict. Specifically, there was no evidence that the other members of the plaintiff's doctoral committee were influenced by any religious discrimination on the part of

Dr. Ijaz. The decision to terminate plaintiff from the Ph.D. program was a committee decision requiring more than one vote in favor of termination. Therefore, the defendant's lone vote, even if the product of religious discrimination, would have been insufficient to cause the plaintiff to be terminated from the program. Consequently, the defendant's motion for judgment notwithstanding the verdict must be granted and judgment entered in his favor. An appropriate order consistent with this memorandum opinion shall be entered this day.

DATED: This 5th day of June, 1989.

/s/ James C. Turk
Chief U.S. District Judge

## EXERPTS FROM TRIAL TESTIMONY

Testimony of Ficenec:

Q: Was it common practice for graduate committee members to attend something like that?

A: In those days it wasn't --- not common. Usually a member or a student would basically present to his committee what he expected to do and usually that work proceeded in a timely and orderly way and the next major interaction with the student was at his final exam.

* * * *

Testimony of Gilmer:

Q: Yes, sir. Now, Dr. Almeida, apparently, from this, thought it was a good summary talk of what had gone on. He felt that there was no evidence of original work. Is that the way you understand that?

A: That's the way I understand it.

* * * *

Testimony of Ijaz:

Q: --- Did you type up that resignation or did that come from another member? How did that arise, the committee resignation?

A: I wrote, you know, the letter that ---I think it was --- I don't remember, but, I mean, it was signed by all the committee members including myself or whatever.

* * * *

Testimony of Al-Zubaidi:

Q: And how close where you to completing your dissertation at the time he left?

A: I need some more data and I need to do the analysis because really almost the chapter we can say finish. I finish all my writing with the chapters. The only thing I need more data and more analysis to do.

Q: Did you need Dr. Parkinson to be

available to you, to be present in order to complete it?

A: Yes.

Q: Did you have any difficulty with the reactor at that point?

A: Yes.

Q: What was the problem?

A: The problem, what I said to the Honorable Judge, the flux, the instrument, the time they gave it to me. My advisor he work also part time on the reactor because he is the chairman and he need to teach courses as well as each year, you know, he go to Argentina or, you know, he will go for a trip or vacation or something like that.

Q: Were there any plans to try to increase the power of the reactor at Virginia Tech?

A: Yes.

Q: And had Dr. Parkinson made any proposals to do that?

A: Yes.

Q: Can you tell us what two (2) choices it gave you in terms of proceeding with your dissertation?

A: There's three (3) choices here, I believe. "If you decide not to carry out this action as rectified by your committee, be informed you will be to form a new committee. You will be required to form a new committee or resign from the graduate school."

Q: In terms of the completion of your dissertation with Dr. Parkinson, did they indicate how much time they would give you to do that?

A: Yes, it is in the first part of the --

Q: And how much time did they give you?

A: I think they said next few months.

Q: Okay. Now, did you think at that point that you could complete the experiment and the dissertation during the next few months

while Dr. Parkinson was in Argentina?

A: No.

Q: And so if you didn't do that, what other choice did they give you?

A: To have a new committee.

Q: And a new committee would require you to start on a new topic. Is that right?

A: Yes.

* * * *

Testimony of Williams:

Q: In fact, you yourself were on a committee, you remember a student named James Francis Hopkinson?

A: Yes, sir.

Q: And he took nine (9) years to get his Ph.D., didn't he?

A: Yes.

* * * *

Testimony of Furr:

Q: Now, there was a problem with this

dissertation when Dr. Parkinson left in that the reactor did not have a high enough flux to be able to get the results that they were looking for. Isn't that right?

A: Again, as I explained, I was competent in the experimental apparatus. I am not competent to speak about the quality of his data. That's out of my field.

Q: Maybe I misunderstood something before. You are not competent to discuss the quality of his data?

A: Well, I used the wrong --- Let me readdress that. The signifiance of the data as far as the point you just mentioned, I can look at data and when you see points that are just spread all the way across the page, there is no significance that you can draw from them, no matter what kind of data it is.

Q: Well, I guess that leaves me confused because I thought you said a minute ago you

weren't competent to discuss the significance of his data.

A: Of a particular type of field, I don't know a great deal about neutron defraction, for example.

Q: That's what this --- Is that what this was in the area of?

A: I gather that, but it was difficult to tell based on the comments I had from Mr. Al-Zubaidi.

Q: You were on the committee and you didn't know whether the topic was in the area of neutron defraction?

A: Remember I said that except for technical advise on certain areas the committee rarely meets. All of this is the responsibility of the advisor.

* * * *

Testimony of Williams - Recross

Q: Okay. I take it from that that the

advisor has a whole lot of control in terms of how long it goes on, how well the student does, how much assistance he gets and how much time he has to complete this project. Is that right?

A: The advisor always plays a fairly big role. He, of course, doesn't do the work.

Q: Right. But if the advisor decides, for whatever reason, to not give his support - and I don't mean financial support, but his academic support, his intellectual support, all the other support - that can seriously affect the ability of the student to complete the dissertation. Isn't that correct?

A: Of course.

---

* * * *

---

Jury Instructions:

The term proximate cause is used in the questions. By way of explanation the

court charges the jury that injury or damage is proximately caused by an act or omission whenever it appears that the act or ommission played a substantial part in actually bringing about or causing the injury or damage.

| | Incorrect Cite | Correct Cite |
|---|---|---|
| **Page #2** | A-27 | A-42 |
| **Page #5** | A-13 | A-23 |
| | A-26,29 | A-41-45 |
| **Page #6** | A-32 | A-49 |
| **Page #7** | A-3,8 | A-4,13 |
| | A-8 | A-13 |
| | A-13 | A-22 n.1 |
| **Page #8** | A-8 | A-13,14 |
| | A-22 | A-34,35 |
| | A-9 | A-14,15 |
| **Page #9** | A-9 | A-14,15 |
| | A-22 | A-34,35 |
| **Page #10** | A-9,22 | A-15,16,35 |
| | A-30 | A-46 |
| | A-9 | A-15,16 |
| | A-30 | A-46 |
| | A-10 | A-16 |
| **Page #11** | A-30 | A-46 |
| | A-10,A-23 | A-17, A-36 |
| | A-21 | A-32 |

| | Incorrect Cite | Correct Cite |
|---|---|---|
| **Page #12** | A-17 n.4 | A-27 n.4 |
| | A-10 | A-18 |
| **Page #16** | A-30 | A-46 |
| **Page #17** | A-30 | A-47 |
| | A-17 | A-27 |
| | A-10 | A-17 |
| **Page #18** | A-35 | A-53,54 |
| **Page #20** | A-24 n.7 | A-38 n.7 |
| **Page #21** | A-23 n.6 | A-37 n.6 |
| | A-24 n.7 | A-38 n.7 |
| | A-31-32 | A-47-50 |
| | A-33 | A-50 |
| | A-30 | A-46 |
| | A-33-34 | A-50-52 |
| **Page #26** | A-34 | A-52,53 |
| **Page #31** | A-11 | A-19 |
| **Page #32** | A-23 n.6 | A-37 n.6 |
| | A-12 | A-20,21 |

(2)

No. 90-1298

Supreme Court, U.S.
FILED
MAR 22 1991
OFFICE OF THE CLERK

IN THE

# Supreme Court of the United States

October Term, 1990

---

AMER AL-ZUBAIDI,

*Petitioner,*

v.

M. A. IJAZ, *et al.*,

*Respondents.*

---

## ON PETITION FOR WRIT OF CERTIORARI TO THE FOURTH CIRCUIT COURT OF APPEALS

## RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

---

Virginia Polytechnic Institute
and State University
Office of the General Counsel
219 Burruss Hall
Blacksburg, Virginia 24061-0121

The Honorable Mary Sue Terry
Attorney General
Commonwealth of Virginia

* Paul J. Forch
Senior Assistant Attorney General

Jerry D. Cain
Special Assistant Attorney General
and General Counsel

* Counsel of Record

---

BEST AVAILABLE COPY

## TABLE OF CONTENTS

Page

REASONS FOR DENYING THE WRIT:.....1

1. There is no constitutional question.....1

2. There is no conflict with other circuits.....9

3. There is no conflict with the decisions of this court.....12

CONCLUSION.....14

## TABLE OF AUTHORITIES

Cases: Page

Bertot v. School District No. 1, Albany County, Wyo., 522 F.2d 1171 (10th Cir. 1975).....9,10,11,12

Gray v. Board of Higher Educ., City of New York, 692 F.2d 901 (2nd Cir.1982).....10,12

Haimowitz v. University of Nevada, 579 F.2d 526 (9th Cir 1978)....9,12

Mt. Healthy City School Dist. Board of Education v. Doyle, 429 U.S. 274, 97 S.Ct. 568, 50 L.Ed.2d 471 (1977).....2,8,12,13,14

Peacock v. Duval, 694 F.2d 644 (9th Cir.1982).....10,11,12

Price Waterhouse v. Hopkins, 490 U.S. 228, 109 S.Ct. 1775, 104 L.Ed.2d 268 (1989).....3,12

**IN THE**

**SUPREME COURT OF THE UNITED STATES**

**OCTOBER TERM, 1990**

---

**No. 90-1298**

---

**AMER AL-ZUBAIDI,**

Petitioner

v.

**M. A. IJAZ, et al.,**

Respondents

---

**REASONS FOR DENYING THE WRIT**

---

**1. THERE IS NO CONSTITUTIONAL QUESTION.**

This appeal does not present for review any issue of law, let alone a

question of sufficient magnitude and national importance for review by the United States Supreme Court. This appeal challenges the sufficiency of the evidence upon which the trial court set aside the jury verdict. The United States Fourth Circuit Court of Appeals affirmed that decision.

Petitioner focuses only on the evidence he presented at trial regarding his oral presentation to his thesis committee. Both the trial court and the appellate court considered Petitioner's entire evidentiary record of six years of ineptness and failure, and properly applied the "but for" standard set by this Court in Mount Healthy City Board of Education v. Doyle, 429 U.S. 274, 97 S.Ct. 568, 50 L.Ed. 2d 471 (1977) and

Price Waterhouse v. Hopkins, 490 U.S. 228, 109 S.Ct. 1775, 104 L.Ed.2d 268 (1989). Indeed, as the Fourth Circuit Court of Appeals stated, "These poor reviews were not the result of any antagonism by Ijaz. We agree that if Ijaz sought to sink Al-Zubaidi, then Ijaz was attempting to sink a ship that already was sinking. Indeed, the record indicates that the graduate committee's decision to recommend the termination of Al-Zubaidi was based on Al-Zubaidi's entire file, not just on the presentation made to the Ph.D. committee. It also indicates that Dr. Gilmer attempted to gather a sample of opinion on Al-Zubaidi outside of his final Ph.D. committee before proceeding with the termination. Thus, the

decision to terminate Al-Zubaidi was not based only on the Ph.D. committee presentation. Despite his success in the classroom, Al-Zubaidi had simply failed as a researcher." Petitioner now urges this Court to ignore the evidence of his six years of experimental research failure and to narrowly focus on an isolated incident as determinative of the decision to dismiss him from the Graduate Program in Nuclear Physics at Virginia Polytechnic Institute and State University. Petitioner's actual argument is that there is insufficient evidence to support the trial court's setting aside the jury verdict, a decision affirmed by the Court of Appeals.

The evidence of record is, however, clear and uncontroverted that Petitioner consistently exhibited poor laboratory knowledge and skills during the first five years in the Graduate Physics Program at Virginia Polytechnic Institute and State University, prior to any contact with Professor Ijaz. Before Dr. Ijaz was involved in any way with Petitioner, other faculty members also expressed doubts about Petitioner's ability and qualifications. After Petitioner had been in the program two years, and three years before Dr. Ijaz was in the picture, a Professor Trower requested that the Graduate Committee terminate Al-Zubaidi's studies. (App. A-9). He found that Petitioner showed precious little understanding of the

most basic physics ideas and was unable to demonstrate any ability to learn even when encouraged to do so. In 1981, five years after Petitioner's admission to the Graduate Program and before Dr. Ijaz was involved in the case, Professor Bowen assessed Petitioner's progress and reported that he and many of his colleagues did not judge that Petitioner's talents are well adapted to physics research. (App. A-11). Petitioner was found to spend far less time in the laboratory than was expected of graduate students. (App. A-9). He was found dangerous to himself and others and his poor skills in using the nuclear reactor required special restrictions on his use of it (App. A-9). This was after Petitioner had been

trying to learn reactor protocol for five years, and before Dr. Ijaz was involved. His first faculty advisor, who resigned after four years of trying to help Petitioner, reported that Petitioner required more help than any other doctoral student the advisor had ever counselled. He found Petitioner poorly qualified for experimental research. (App. A-12).

This was the uncontroverted record of Petitioner. This was the record before Dr. Ijaz became involved in any way. There was no evidence that the members of the faculty were in any way motivated by, let alone knew, Petitioner's religious preference. Also in evidence was testimony from an official at Oak Ridge, Dr. Toth, who was

also a member of the thesis committee, that Petitioner had no competency in computer programs, could not understand various physics concepts, had made little progress and simply became a nuisance to the Oak Ridge staff. There was no evidence that Dr. Toth was in any way retaliating against the Petitioner because of his religion, let alone that Dr. Toth even knew of his religious preference.

Applying the Mt. Healthy evidentiary standard, the District Court found that the evidence overwhelmingly proved that Petitioner would have been dismissed, regardless of Ijaz. Petitioner's record, compiled over the years, dictated this.

## 2. THERE IS NO CONFLICT WITH OTHER CIRCUITS.

Haimowitz v. Univ. of Nevada, 579 F.2d 526 (9th Cir. 1978) does not conflict with the Opinion of the Fourth Circuit. It is in harmony with this case. Haimowitz was a mixed motive case where summary judgment was granted without the Plaintiff having had the opportunity to show the impact of an advisory committee on a decision. Haimowitz held that a fact question was presented and remanded for development of that testimony. Petitioner was given the opportunity called for in Haimowitz and the District Court and the Appellate Court found that the evidence was lacking to support a finding in his favor. The other cases cited from other Circuits, Bertot v. School District No.

1, Albany County, Wyo., 522 F.2d 1171 (10th Cir. 1975); Gray v. Board of Higher Educ., City of New York, 692 F.2d 901 (2nd Cir. 1982); and Peacock v. Duval, 694 F.2d 644 (9th Cir. 1982) are not in conflict. In Bertot, the decision maker relied solely on a group recommendation, without independent investigation. The present case is so factually dissimilar that Bertot is not applicable. In the instant case, Dr. Gilmer made an independent investigation and also considered Petitioner's lengthy record of poor performance. Gray was an appeal from an interlocutory order concerning discovery matters. The implication was that a committee's input may be proper evidence where one cannot otherwise learn of the group

recommendation, deliberations and reasons for its decisions. Petitioner had available the recommendations of each committee involved as well as access to members for direct or cross examination. Peacock was a summary judgment case akin to Bertot. The opinion held that there were material fact questions to be determined on the First Amendment claim and summary judgment was improper. In the present case, such testimony was presented and considered. The trial court found that Petitioner would have been terminated regardless of Respondent's actions. The Fourth Circuit Court of Appeals affirmed. At the trial of the present case, the full evidentiary record was developed, the decision maker considered

the Petitioner's six year record at the University and in every other way the present case was free of the errors giving rise to Haimowitz, Bertot, Gray, and Peacock. After all the evidence was in, it was clear that Petitioner would have been terminated, regardless of Respondent's activities.

**3. THERE IS NO CONFLICT WITH THE DECISIONS OF THIS COURT.**

The decision of the Court below is also in complete harmony with Mt. Healthy and Price Waterhouse. These cases were not violated; they are followed by both the trial court and the Fourth Circuit Court of Appeals. Petitioner simply chooses to ignore the entire record of evidence.

The rationale behind the Mt. Healthy "but for" rule in mixed motive cases is that one whose record otherwise qualifies him for dismissal should not be placed in a better position vis a vis retention (as a student) because of the exercise of a constitutional right than he would have occupied had he done nothing. That rationale is appropriate here. Petitioner had established a poor record of experimental research knowledge and skills in the five years before Respondent became his advisor. In his last year, while being advised by the Respondent, that record did not improve, nor did it become worse. The evidence heard and considered by the trial court and reviewed by the appellate court is overwhelming that

Petitioner would have been terminated from the graduate program regardless of Respondent's involvement.

## CONCLUSION

Petitioner has shown no conflict among the circuits and has made no viable argument for overruling Mt. Healthy. The evidence supporting the lower court opinions is clear and convincing. Respondent M. A. Ijaz respectfully requests that the Writ of Certiorari be denied.

Respectfully submitted,

The Honorable Mary Sue Terry

*Paul J. Forch, Jr.

Jerry D. Cair

Virginia Polytechnic Institute
and State University
219 Burruss Hall
Blacksburg, Virginia 24061

*Counsel of Record

March, 1991

FILED
MAR 29 1991
OFFICE OF THE CLERK

(3)

No. 90-1298

IN THE

# Supreme Court of the United States

October Term, 1990

AMER AL-ZUBAIDI,

*Petitioner,*

v.

M. A. IJAZ, *et al.*,

*Respondents.*

## REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Linden Tower Building
Suite 108
2nd & Franklin Streets
Richmond, Virginia 23219
804) 788-4412

* Gerald T. Zerkin
Kelley H. Brandt
Robert Godfrey

* *Counsel of Record*

Appellate Printing Services • 523 East Main Street • Richmond, VA 23219 • (800) 642-7789

## TABLE OF CONTENTS

Table of Contents..... i

Table of Authorities..... ii

I. Argument:

A. This Case Presents The Question Of Causation In Mixed Motives Cases..... 2

B. There Exists A Conflict Among The Circuits..... 7

C. The Decision Below Is In Conflict With Decisions Of This Court..... 8

II. Conclusion..... 10

## TABLE OF AUTHORITIES

### Cases

Price Waterhouse v. Hopkins,
490 U.S. 228, 109 S.Ct. 1775,
104 L.E.2d 268 (1989).....3,4,9,10

McDonnell Douglas Corporation v. Green,
411 U.S. 792, 935 Ct. 1817,
36 L.Ed. 2d 668 (1973)..... 4

Givhan v. Western Line Consolidated
School Dist., 439 U.S. 410, 416,
99 S.Ct. 693, 58 L.Ed. 2d 619 (1979)... 5

Haimowitz v. Univ. of Nevada, 579
F.2d 526 (9th Cir. 1978).....7,8

Mt. Healthy City School Dist., Board
of Education v. Doyle, 429 U.S. 274,
97 S.Ct. 568, 50 L.Ed. 2d 471 (1977)... 9

No. 90-1298

**IN THE SUPREME COURT**
**OF THE UNITED STATES**

October Term, 1990

**AMER AL-ZUBAIDI,**

Petitioner,

v.

**M. A. IJAZ, et al.,**

Respondent.

# REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

This reply brief addresses arguments first raised in the brief in opposition to the petition for writ of certiorari. Sup. Ct. R. 15.6.

## I. ARGUMENT

### A. THIS CASE PRESENTS THE QUESTION OF CAUSATION IN MIXED MOTIVES CASES

It is not the petitioner's intention to have the trial evidence reassessed by this Court; that evidence was considered and weighed by the jury.[1] Rather, it is petitioner's intention to have this Court recognize, as the Fourth Circuit majority refused to do, that, once the plaintiff has shown that his constitutionally protected conduct was a substantial or motivating factor in the adverse treatment he received, the "but for" test applicable to mixed motives cases requires defendants

---

[1]. Unlike the respondent, the petitioner believes that the jury, not the judge, was "the decision maker" in this case. See, Brief of Respondent at 11. The jury reviewed "the full evidentiary record", id., and found specifically that petitioner's termination was caused by respondent's unlawful actions and that petitioner could have completed his program `but for' those actions. (A-23).

to present actual evidence, that the same decision would have been made absent the unlawful animus.

The respondent ignores, as he must, the role of the various committees in causing petitioner's termination. The respondent relies instead on Dr. Gilmer's review of Al-Zubaidi's file, a review which the jury obviously rejected, of a file whose multiple level hearsay could not withstand cross-examination or jury scrutiny.

In relying on Gilmer's review, the respondent would reduce the "but for" test to a mechanical exercise in which, despite its burden of proof on the issue, see, Price Waterhouse v. Hopkins, 490 U.S. 228, 109 S.Ct. 1775, 104 L.E.2d 268 (1989), a defendant's recitation of the proffered nondiscriminatory basis of its action would be beyond scrutiny by the fact

finder and would immunize it from liability. The respondent would thus not only reduce a defendant's burden on this issue to a simple burden of production, such as exists to rebut a prima facie showing under Title VII, see, McDonnell Douglas Corporation v. Green, 411 U.S. 792, 935 Ct. 1817, 36 L.Ed. 2d 668 (1973), but would also raise the fact of production to an absolute, unrebuttable defense.[2] This result is directly contrary to this Court's admonition in Price Waterhouse that "proving `that the same decision would have been

---

[2]. Only by reducing the defendant's burden to one of mere production can the respondent in this case possibly say with a straight face that his version of petitioner's record was "uncontroverted". Brief of Respondent at 7. The only thing about petitioner's file left uncontroverted was the fact that certain documents were in his file; the contents of those documents were thoroughly discredited. (A-47-53).

justified...is not the same as proving that the same decision would have been made.'" 109 S.Ct. at 1791, quoting Givhan v. Western Line Consolidated School Dist., 439 U.S. 410, 416, 99 S.Ct. 693, 58 L.Ed. 2d 619 (1979).

In fact, the district court never relied on Gilmer's review of petitioner's record in granting judgment NOV. The district court focused instead on its belief that "there was no evidence that the other members of the plaintiff's doctoral committee were influenced by any religious discrimination on the part of Dr. Ijaz." (A-44-45). The district court found that the committee vote, not Gilmer's review, provided the respondent with his liability shield. (A-45).

Similarly, the Court of Appeals majority relied on its belief that "the record indicates that the graduate

committee's [emphasis added] decision to recommend the termination of Al-Zubaidi was based on Al-Zubaidi's entire file," referencing only passingly Gilmer's "[attempt] to gather a sample of opinion on Al-Zubaidi outside of his final Ph.D. committee ...." (A-20).

Thus, it is only in respondent's revisionist version of the litigation that Gilmer's alleged review of the entire record is elevated to a position of immutability. And it is only by deflecting attention from the fact that both courts below relied on the committee decisions to preclude liability that the respondent is able to pretend that this case does not, in fact, present the substantial question as to whether such decisions do provide a shield from such liability in a mixed motives case. Both courts below relied specifically on the

committee defense to justify their decisions, respondent's suggestions to the contrary notwithstanding.

### B. THERE EXISTS A CONFLICT AMONG THE CIRCUITS

The respondent attempts to rationalize the Ninth Circuit's decision in Haimowitz v. Univ. of Nevada, 579 F.2d 526 (1978) by sleight of hand. He argues that, consistent with Haimowitz, petitioner did receive "the opportunity to show the impact of an advisory committee on a decision," but that the courts found the evidence lacking. Brief of Respondent at 9.

Of course, that is not the opportunity which Haimowitz mandates. The question under Haimowitz is not whether the committee vote effected the result, but whether the unlawfully motivated

actions of the advisor effected the committee vote. It is that opportunity which the courts below denied after the fact.

The district court specifically held that petitioner's proof was lacking not because he had failed to show the impact of the committee decision on the result, but because he had not shown that the other committee members had shared respondent's animus. (A-45). As the dissent below noted, relying on Haimowitz, "it is simply incorrect to say as a matter of law that Ijaz counted as only one vote ... or that [his] influence ended with the single vote he cast." (A-39).

### C. THE DECISION BELOW IS IN CONFLICT WITH DECISIONS OF THIS COURT

One need look no further than respondent's own argument to find the inconsistency between the result below and

the decisions of this Court in Price Waterhouse and Mt. Healthy City School Dist., Board of Education v. Doyle, 429 U.S. 274, 97 S.Ct. 568, 50 L.Ed.2d 471 (1977). Mt. Healthy and Price Waterhouse clearly establish that the defendant has the burden of proving that, even in the absence of the unlawful considerations, the same decision would have been made. Mt. Healthy, 429 U.S. at 287; Price Waterhouse, 109 S.Ct. at 1790. Yet the respondent is forced to argue that the petitioner was afforded "the opportunity to show the impact of an advisory committee on a decision," Brief of Respondent at 9, and that evidence as to this issue was "lacking to support a finding in [petitioner's] favor". Id. Were the majority opinion below truly consistent with this Court's decisions in Mt. Healthy and Price Waterhouse, the

respondent would not be forced to contradict the clear burden of proof set out in those cases. Indeed, the Fourth Circuit's majority holding recognizes that Gilmer's decision was made at least in part as a result of the thesis committee recommendation (A-20-21), yet ignores this Court's clear holding that a defendant in a mixed-motives case "may not meet its burden in such a case by merely showing that at the time of the decision it was motivated only in part by a legitimate reason." Price Waterhouse, 109 S.Ct. at 1791.

## II. CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

GERALD T. ZERKIN*
KELLEY H. BRANDT
ROBERT GODFREY
**Gerald T. Zerkin & Associates**
Linden Tower Prof. Centre, Suite 108
2nd & Franklin Streets
Richmond, VA 23219
(804) 788-4412

* Counsel of Record